No. 59.

Brf. of Bodley, Low & Simrall for Appellees (reargument)

Supreme Court of the United States.

OCTOBER TERM, 1899.

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THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL,
APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR APPELLEES, ON REARGUMENT.

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Supplemental Brief for Appellees, on Reargument.

In each of the two consolidated cases involved in this appeal the question is whether there has been a breach by the United States of a contract with appellees for the enlargement by excavation of the Louisville and Portland canal "at the falls of the Ohio river," the appellees claiming that such a breach did occur by reason of the appellants' wrongful refusal to extend the contract period for completing the work as required by a clause in the contract providing additional time in case of prevention by freshets. The con-

tract was made "for and in behalf of the United States" by the engineer in charge of the work. The cases having been ordered to be reargued without reference to any particular questions, it becomes necessary to make a general review of them. Whilst relying on our former brief for many details of the cases, both of fact and law, we present in addition the following statement and argument as to what appear to be the more important questions which arise on this appeal. Since the questions involved in the two cases are substantially the same, we shall here discuss those involving the "Upper work," the other differing in comparatively unimportant respects.

SUMMARY OF THE MOST MATERIAL FACTS.

The record warrants, we believe, each of the following statements, which may help to clear the way for a distinct view of the turning points in the case:

1. The rock "was in the river bed in an exposed situation and was exposed to great force of the river when the river rose" (Finding V, p. 34).

2. Before the contract was made the specifications prepared by the Government engineer, "the party of the first part, . . . for and on behalf of the United States," were exhibited to the contractors, and they contained a clause that the contractor "must begin work within twenty days after notification that his bid has been accepted, *unless hindered by high water*," and also a clause that the contract would provide "that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from '*freshets, ice or other force or violence of the elements and by no fault of his or their own*'" (Finding VI, p. 34).

These specifications did not inform the contractors that if they should, in fact, be thus delayed by "freshets, . . . and by no fault of his or their own," the

allowance of additional time was to depend on the discretion of the engineer, either as to their right to any allowance at all or as to the amount of time to be allowed. On the faith of these provisions in the specifications the contractors entered into the contract (Finding VI, p. 34).

3. The provision in the contract differs materially from the statement of it in the specifications in this: That in the contract there is the added clause "*such . . . as in the judgment of the party of the first part, or his successor, shall be just and reasonable.*"

4. The whole proviso concerning extension of time for completion of the work in the contingent event of its being prevented by freshets, ice, or other force and violence of the elements and by no fault of their own (which contingency we shall, for brevity's sake, hereafter refer to generally as "prevention by freshets")—consists of three parts, first, the statement of the *contingency;* secondly, the *result of that contingency,* namely, the extension, and, thirdly, the *effect of the extension* upon the terms of the contract. The proviso (with the clauses numbered and the added clause above mentioned italicized) reads as follows:

(1) "If the parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, (2) *such* additional time may in writing be allowed him or them for such commencement or completion *as in the judgment of the party of the first part or his successor shall be just and reasonable;* (3) but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon" (Finding I, p. 31).

(It will be observed that in the first clause of the proviso, stating the *contingency* of prevention by freshets, upon the happening of which additional time may be allowed, no reference is made to the judgment of the engineer. In the second clause, stating the *result* of that contingency, namely, the allowance of additional time, the material added words above referred to are "Such . . . in writing as, in the judgment of the (engineer), shall be just and reasonable."

How liberally these added words should be construed to give discretionary powers to the engineer—whether upon the happening of the contingency referred to (namely, prevention of completion of the work by freshets and not by fault of the contractors) they should be construed to simply empower him to decide *how much* time "shall be just and reasonable," or whether they should be so liberally construed in favor of the Government as to give its engineer, the nominal "party of the first part," power to decide both for the Government and the contractors whether they have in fact been prevented by freshets—these are the main issues of the case to be discussed presently.)

5. The contract is in the usual form provided *by the Government* (Finding VI).

6. The contract provides for the excavation, at the rate of 85 cents per yard, of 110,000 cubic yards, "more or less," of solid rock. (The final estimate of the Government's engineer was 118,935.22 yards.) (Finding XII, R., 37.)

7. The contract provides that in case the contractors fail to begin work at the time agreed, or fail "in the judgment of the engineer in charge" to prosecute the work diligently, the engineer shall have power, *with the sanction of the chief of engineers*, to *annul* the contract (p. 31).

The annulment clause (p. 31) reads as follows:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, *with the sanction of the chief of engineers*, to *annul this contract by giving notice in writing to that effect to the party or parties* (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States."

Finding I, Rec., p. 31.

8. The contract was *never annulled* (Finding X, p. 36).

9. The original period for completion of the work (August 20, 1885, to December 31, 1886) was extended twice, the last extension being for the year 1888.

10. The first extension (for 1887) was requested by the contractors, was granted them, and was evidenced "in writing" by a formal "supplemental contract," which was made "subject to approval of the Chief of Engineers," and was approved by the acting Secretary of War, the superior of the Chief of Engineers (Finding III, p. 32). It contained several material though minor changes in the contract requirements as to methods of doing the work.

The second and last extension (for 1888) was applied for in a letter of the contractors to the engineer in charge proposing other material changes of method of working. He forwarded the letter to the Chief of Engineers for approval, and, for "the interests of the Government," recommended its concurrence in the exten-

sion, and thereupon the extension "was granted and approved *by the Chief of Engineers* 'on condition that the provisions of their application are faithfully carried out,' of which approval the claimants were *notified* in writing" by the engineer in charge by a letter addressed to them stating that the time for completion "is extended to December 31st, 1888," on the conditions mentioned.

11. The Court of Claims did not feel called upon to decide (Opinion, R., 44) and did not decide upon what grounds either of these extensions was granted. It did not decide that they were occasioned by the fault of the contractors (appellants' brief in stating it did is erroneous). On the contrary, it held that any such faults (if there were any) were waived by the parties at the time the extensions were given (R., 44).

12. The last extension, for the year 1888, having been granted on conditions mentioned in the letter of the contractors to the engineer, wherein additional plant and force sufficient to remove 640 yards per day were required (Finding IV, pp. 32–34), the Court of Claims found that "during the working season of 1888 the claimants *were diligent*" (1) "in the prosecution of the work," (2) "in preparing therefor," and (3) "in endeavoring to exclude the water and freshets of the river" (Finding VIII, p. 36).

13. The subordinate facts are also (we think needlessly) found that they did provide the additional plant required and had it ready for operation at the beginning of the season (Finding VIII, p. 36). But "the condition of the Ohio river was, during the season of 1888, the period of the last extension, unusual and unprecedented for repeated and continued freshets and high water, . . . in consequence of which freshets and high water the working season of 1888 . . . was limited to about thirty-five days" (Finding VII, p. 34), and "the

time remaining for active work, after deducting the time when it was impossible to work on account of high water and freshets, was insufficient for the completion of the work under the contract within the period of extension, and it was impossible for claimants to complete the work within the time thus remaining" (Finding XVII, p. 38). "There was insufficient working time to complete the work by December 31, 1888," even at the rate of 640 yards per day, "and this from no fault of the claimants during the last extension" (Finding VIII, p. 36).

14. "No act or omission of the claimants during the period of the last extension made it impossible to complete the work by December 31, 1888" (Finding VIII, p. 36).

15. The contract provided that the rock to be excavated "will be the property of the contractor" (Finding XIV, p. 37).

16. The remaining rock amounted at the expiration of the last extension to 83,500 yards (Finding XII, p. 37).

17. The cost of removing it would have been $1.25 per yard, or $33,400 (Finding XIII, p. 37).

18. Every yard of the rock when broken would yield 1½ yards of broken stone, the 83,500 yards remaining to be excavated thus amounting to 125,250 of broken stone (Finding XIV, p. 37).

19. This broken stone had a ready market in Louisville at $1.25 per yard (Finding XV, p. 37).

20. The cost of crushing and delivering the rock for this market was 50 cents per yard; the net value to claimants of the crushed and delivered rock, 75 cents per yard, or $93,937.50 for the 125,250 yards. This, less $33,400, the cost of removing, left a net profit of $60,537.50 (Finding XVI, p. 37).

21. The claimants applied to the engineer for addi-

tional time to complete the work, because they had been prevented from completing it "by freshets and force and violence of the elements and by no fault of their own" (Finding X, p. 36), he being, in his representative character, the party of the first part in the contract and the uniformly recognized intermediary between the contractors and the Government for the purpose (Rec., pp. 32, 33, 34, 39, 40, 41).

22. (*a.*) The engineer refused to allow any additional time (*id.*).

(*b.*) He did not "find or decide that they were not so prevented" (*id.*).

(*c.*) He did not give any judgment or decision whatever on the question as to whether they were or were not so prevented (*id.*).

(*d.*) He "based his refusal to further extend the contract because, as he asserted, the claimants *had for a number of seasons failed to complete the work within the time agreed upon*" (Finding X, p. 36). (He did not base his refusal upon any neglect or fault of the claimants, *even prior to 1888*, but based it simply upon the very obvious fact that the work had not been completed, thus treating the prevention by act of God, without fault of the contractors, as immaterial.)

23. Every extension granted under either of these contracts was granted, so far as the record shows, for the "interests of the Government" (R., pp. 33, 39, and 40).

24. As the power of the "engineer in charge" to grant or refuse an extension is the main point of the case, we will here refer to his powers.

(*a.*) He has no power alone to make the contract, but *only with the approval of the Chief of Engineers.* The original and supplemental contracts alike provided that: "This contract shall be subject to the approval

of the Chief of Engineers." (See contract, p. 15; supplemental contract, p. 16.)

The first extension (for 1887) was allowed by a formal "supplemental contract" which was *approved by the Secretary of War*, the superior of the Chief of Engineers (R., p. 32).

The second and last extension (for 1888) was *recommended* to the Chief of Engineers by the engineer in charge, and it "was *granted and approved* by the *Chief of Engineers*" (Finding IV, p. 34), and thereupon the engineer in charge *notified* the contractors ("in writing") that "the time for completion . . . is extended," &c.

(*b.*) The engineer in charge cannot change the project so as to increase or diminish the cost, but before taking effect any agreement for it must be approved by the Secretary of War (Rec., p. 11).

(*c.*) The contract provides (R., p. 10): "The decision of the engineer officer in charge *as to quality and quantity* shall be final."

(*d.*) Also any agreement for extra work or materials must be approved by the Chief of Engineers (R., p. 11).

(*e.*) *With the sanction of the Chief of Engineers*, the engineer in charge has power to annul this contract by giving notice in writing to that effect in the event that either (1) the contractors delay beginning the work or (2) "shall, in the judgment of the engineer in charge, fail to prosecute . . . diligently the work," &c.

(*f.*) The engineer is given power to direct the work in certain respects (R., p. 12, par. 2; p. 26, pars. 3, 8; p. 27, pars. 13, 18; p. 28, par. 24).)

(*g.*) Lastly, the freshet proviso, which is the special subject of contention, says that in case of prevention of completion by freshets, &c., "*such* additional time may in writing be allowed them *as*, in the judgment of the engineer, shall be just and reasonable."

We believe we have now stated in general form the substance of all the material facts found by the lower court. The retained percentages are not in dispute, appellant conceding the right to recover them. The conduct of the work prior to the last extension period (1888) we have considered immaterial, as did the lower court. There is *no* finding that prior to 1888 the claimants were in fault, or that they were not in fault. The court simply presumes that as "both parties treat the extensions as having been made on sufficient grounds, we have only to do with the contracts as last extended" (Rec. p. 44). There were new and material terms added to the contract at the time of the last extension, which made it, as a whole, a new contract, to which previous faults, even had they been found, would have no application. For this reason and because the subject is referred to in our original brief, we do not discuss it here. For like reason we do not embrace in this summary the particular findings as to freshets each month during 1888, sustaining the finding that the completion of the work that year was impossible and prevented by freshets. Likewise the finding that the force of the Government did not complete the work in three years after 1888, we deem unimportant, as merely subordinate *evidence* of the difficulties of performance, conducing to prove that the prevention was caused by freshets and not by the fault of the contractors. Whereas, as we have seen, the court has elsewhere found that the completion of the work was made impossible and prevented by the freshets, and it has elsewhere found that the contractors *both in preparing for and conducting the work* "*were diligent*," and this renders the particulars of diligence or want of diligence wholly immaterial and any findings concerning them supererogation. When the Court of Claims has found that the contractors, during the period of the last extension, (1) *were prevented by freshets*, and (2) "*were diligent*" (*a*) in *preparation* for the prosecution of the work, (*b*) in the *prosecution* of the work, and (*c*) in *endeavoring to ex-*

clude the water and freshets of the river (Finding VIII, p. 36), we contend that this finding covers the whole field of performance of the terms and conditions of the contract during that period, including any omissions or faults charged against them during that period in the pleadings or evidence in the court below. We think, therefore, that your Honors will find this summary to contain the substance of all the facts found that are material to the questions to be considered.

ARGUMENT.

The Court of Claims having, by its findings, established the fact that the parties of the second part were by freshets, ice, or other force or violence of the elements, and by no fault of their own prevented from completing the work at the time agreed upon, we contend:

First. That the contract gave the appellees the legal right to "such . . . additional time . . . as shall be just and reasonable," the *amount* to be fixed by the engineer in the exercise of a just and reasonable discretion.

Under this general proposition we contend:

1. That when the contract says that in case the completion is prevented by freshets, etc., and by no fault of their own, "*such* additional time *may* be allowed" them, the word "*such*" means "*so much*"—"*such amount of*"—time, and "*may*" means "*will*" or "*shall*" "be allowed them."

2. That when it provides that "*such* additional time" may be allowed "*as*, in the judgment of the (engineer), shall be just and reasonable," it refers to his decision the question what is "*such* additional time" as will be "just and reasonable," but it does not make him judge to determine, both for his principal and the appellees, the question whether they have in fact been so prevented by the act of God and not by fault of their own.

Second. That the appellees had the right to the judgment of the engineer as to how much additional time would be just and reasonable and to be allowed that additional time; but he having refused to exercise his judgment or to name any time at all, the further performance of the contract was wrongfully prevented, and the appellees are entitled to damages.

Third. That this clause was never abrogated or exhausted of force by the first extension of the period for completion of the work, as contended by counsel for appellants, but that it remained a vital part of the contract as extended.

Fourth. That the damages awarded by the Court of Claims were not uncertain or remote, but were properly awarded.

We propose briefly discussing these propositions in the order given with a special view to the points which, judging from questions asked of counsel on the former hearing, we suppose may be considered pivotal by your honors. We shall endeavor to avoid repeating anything stated in our original brief which may not be necessary to make clear the argument of this.

First.

We contend that the contract gives appellees the legal RIGHT *to "such . . . additional time . . . as . . . shall be just and reasonable," the* AMOUNT *to be fixed by the engineer in the exercise of a just and reasonable discretion.*

Counsel for the Government, on the contrary, contend that it gives no legal right at all, but say (Brief, p. 29):

> "The right to extension of the time, *in case of prevention by the force and violence of the elements*, could not be demanded by the claimants as a matter of right, but

could only be appealed for *as a matter of grace*, trusting to the sense of 'justice and reasonableness' of the engineer in charge."

I. We have seen that this work was in the bed of the Ohio river at Louisville and exposed to great force of the river and impossible to be carried on during high water.

In construing the intent of the contract, the court will consider the surrounding circumstances. Is it reasonable to suppose that the parties intended that there should be no contract relief against such foreseen violence of the elements plainly making unavoidable delays probable, if not certain? On the contrary, we apprehend that this salient fact was regarded by the parties and should be regarded by the court as the most important circumstance of all those surrounding the parties when the contract was made and shedding light upon their intent. These freshets and high water are referred to many times in the contracts and specifications.

There is a contemporaneous construction given to the language under discussion which is very significant. As we have seen, in the specifications prepared by the engineer himself and exhibited to the appellees before the contract was entered into, "they were advised that *their contract would provide* 'that *additional time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements and by no fault of his or their own*'" (Finding VI, p. 34). This partial quotation in the specifications of the clause to be contained in the contract was misleading in this respect: whereas by the words used in the specifications each party would be left to determine for himself and both parties to agree as to the amount of the additional time, in the contract a referee was appointed to fix its amount. In the contract the additional time to be allowed was stated to be "*such . . . as*, in the judgment of the party of the

first part, shall be just and reasonable." It is true, of course, that the contractors signed this contract and are bound by its terms; but the character of the work to be done and the promise held out in the specifications, which meant, if it meant anything, that the contractors were not to be held to unlimited performance if prevented by the act of God are persuasive not only (1) that they did not mean to agree to stake their large investment of money and time upon the mere "grace" and "sense of 'justice and reasonableness' of the engineer" in case the act of God prevented their completion of the work in the very limited time allowed them, but (2) afford strong reason for so construing the contract as to limit rather than enlarge the powers of the engineer, and (3) for construing the language used in the contract to have the same meaning and to give the same contractual right to an extension as would have been given by the words used in the specifications, excepting only that the power to ascertain the *amount* of time which "shall be just and reasonable," having been expressly referred by the added words to the engineer, is vested in him by those added words. Representing the United States, he is the "party of the first part." He occupies the double relation of adverse party and arbiter between himself and the contractors. That fact alone should resolve every implication as to his powers in favor of the appellees. The form of contract was furnished by him—a form prepared by the Government—and containing throughout most elaborate and stringent protective clauses for the benefit of "the party of first part." That is another reason for strictly construing his powers. So much as to the situation of the parties when the contract was made.

II. When the contract says that "if the (claimants) shall by freshets or other force or violence of the elements and by no fault of his or their own be prevented . . . from . . . completing the work . . . at the time agreed upon, *such* ad-

ditional time may in writing be allowed . . . them for such . . . completion *as* in the judgment of the (engineer) shall be just and reasonable," we contend that the words "such as" mean "so much as," "such amount as," and that "such additional time," etc., means "so much" or "such amount" of "additional time as in the judgment of the (engineer) shall be just and reasonable."

A. It will be noted that the proviso under discussion consists of two entirely distinct clauses. The first states the *contingency* of prevention by freshets, etc. The second prescribes the *result* of the happening of that contingency. If the first clause stating the contingency had been intended to make the engineer judge of the happening of this contingency, the clause would presumably have said so. But it did not. He is not mentioned in it. It does not say, "If *in the judgment of the engineer* the (contractors) shall by freshets, etc., be prevented," but it merely states a physical contingency, saying, "If the (*contractors*) *shall be prevented* by freshets," etc. This first clause of the proviso, therefore, does not purport to refer to the engineer's decision the question whether the contractors have been prevented by freshets, etc. If he has such authority, it must be found in the second clause of the proviso. But the second clause merely states the result of the happening of the physical contingency of prevention by freshets, etc., and says that in that event "*such* additional time may in writing be allowed them . . . *as*, in the judgment of the (engineer), shall be just and reasonable." That language is, we submit, precisely the same as if the clause read "additional time may in writing be allowed them, *such as shall be just and reasonable* in the judgment of the engineer." Here it is evident that the question for the engineer is, What is "*such as* shall be just and reasonable"? This transposition only makes clearer the fact that the language refers to the engineer's judgment only the *amount* of additional time.

B. But it will be said that whether the engineer was or was not vested with authority to determine, both for the Government and the contractors, whether they were prevented by freshets, etc., still, since the result of such prevention is only that additional time "may" be allowed them, they have no contract right to any allowance whatever, but are relegated to the "grace" of the engineer in charge.

This brings us to the discussion of the second clause of the proviso:

> "Such additional time may in writing be allowed . . . them . . . as in the judgment of the (engineer) shall be just and reasonable."

Counsel for appellees contend that "may" is here merely permissive; that the engineer "may" or he may not allow additional time.

This contention is, we think, fatally defective for two reasons: First, because it assumes that the allowance of time is not ordained by the contract itself upon the happening of the contingency mentioned in the preceding clause, but is left to the engineer, and, secondly, because the word "may" is not here used in such permissive sense.

Let us examine these propositions.

The contention that additional time is not allowed by the contract itself, *ex proprio vigore*, but is to be allowed *by the engineer*, is, we think, due to confusion arising from the mere propinquity of words not directly related; and it would necessitate the interpolation into the clause of words which are not there and which would vitally alter its meaning. In case of prevention by freshets the clause simply says: "Such additional time may in writing be allowed . . . them as in the judgment of the (engineer) shall be just and reasonable." It does not say how or by whom it

is to be allowed, nor that any particular person is to allow it. It simply binds the parties by its terms and says that in the contingency provided it "may be allowed *them*," the contractors. But appellees' contention would necessarily make the clause read, "Such additional time may be allowed them *by the engineer* as in the judgment of the (engineer) shall be just and reasonable." The words "may be allowed" do *not* refer to the engineer, but to the *contractors*. The clause does not provide that the additional time may be allowed "*by the engineer*," but simply that it may be allowed "*them*." It is not intended to express the contingency of *his allowing*, but of *their receiving* additional time. It does not *express* a power on his part to allow additional time, but indicates merely the *privilege to them* which the contract, of its own force, provides as the result of prevention by freshets, namely, that the contractors "may be allowed" additional time—in other words, may *have* additional time.

It will be observed that it was not necessary to the validity of the contract that the contingency of prevention by freshets, or the allowance of the extension, or even the fixing of the amount of it should be left to the engineer or to any one else to determine. And if any special power is given to the engineer by the contract, such power should not be enlarged by construction; on the contrary, every doubt should be resolved against enlarging his power. The contract would be quite as *valid* if he had not been mentioned in the proviso at all, but it had read:

> If the (contractors) shall by freshets . . . be prevented, . . . such additional time may in writing be allowed them for such completion as shall be just and reasonable.

If each and all of the several terms of the clause thus written can be given full effect without reference to the engineer at all, then we submit that there is no need by *implication* to make any of them depend upon his judgment,

especially if, as we have seen, this necessitates interpolation of material words into the contract. That every term of the clause thus written can be given full effect is, we think, clear. The question of prevention by freshets and not by fault of the contractors would be one which the United States, by its authorized agent, would determine for itself and the contractors would determine for themselves, but which neither would decide for the other. Should they disagree, they have the usual remedies in court.

Whether the contractors would be entitled to reasonable further time would likewise be determined by each party for himself, with the right to appeal to the law in case of disagreement. What would amount to a reasonable time would be a question about which they might also differ and would have the like rights and remedy.

If the contractors were right on these questions they would have the right to have the additional time allowed them by the other party in writing. There is nothing novel or unusual about these propositions, for they are like those applying to very many contracts in our daily experience. Provisions for arbitration (and especially by the agent of one of the parties to the contract occupying a dual relation of formal party and arbitrator) are exceptional and not the rule. Now, surely, because in the second clause of the proviso the engineer is made judge of the *amount* of time that is just and reasonable, it does not follow that he is to decide whether any time at all shall be allowed, notwithstanding prevention by freshets, or that he is to decide whether the contractors were thus prevented, to say nothing of having a power so broad as to put the contractors absolutely at his mercy and legally justify him in inducing them to incur great outlays for the prosecution of their work, and then denying them any real opportunity to prosecute it. We submit that since every one of the terms of the proviso, which appellees claim were within the jurisdiction of the engineer as arbitrator and which we claim

were outside of it, can be given full effect without construing the contract to give him such jurisdiction, it would be most inequitable and contrary to established rules of construction by implication to amplify his discretionary power as arbitrator so as to make it embrace anything beyond the *amount* of additional time which, in his judgment, is just and reasonable.

But it will be said that even if the engineer is not vested with power to allow or refuse time in case of prevention by freshets, etc., still the word "may" is merely permissive and does not give the contractors a *right* to any time.

This argument is equivalent to saying that the ninety-odd words contained in the proviso are not intended to declare the terms of the contract, but merely a possible favor which one party may, if he pleases, grant to the other.

But in truth the word "may" in this proviso means the same as "shall." It is a word which usually expresses a contingency, and is used, according to circumstances, in two different ways and with very different meanings. On the one hand it may express a contingency involving discretionary power; as, for example, if we say, "I may do this;" "I may allow that." Referring here to the positive act of a free agent, it implies discretionary power. But it may express a contingency wholly dissociated from any discretionary power, as if we say, "I may *be* shot;" "I may *be* allowed a respite;" "additional time may *be* allowed them." In such cases the contingency expressed by the word "may" involves a status, or a privilege, and in no-wise refers to any positive act or discretion of any one. But it may be said that the word "allowed" refers not merely to the privilege of the contractors to have an extension, but also to a positive act involving discretion. It is quite true that the word "allowed" may be used in such a

double sense. Thus, if the clause had read "may be allowed (1) *them* (2) *by the engineer*," the word would not only relate to a privilege of the contractors to have the allowance, but also to an act of the engineer in allowing it. But in the clause we are discussing the word "allowed" has no such double significance, for while it does plainly and expressly relate to the contractors having an allowance ("additional time may be allowed *them*"), the contract may directly, by its own force, allow the time as well as indirectly through the engineer, and the word cannot be made to relate to a power of the engineer to allow without interpolating after the words "may be allowed them" the material words "*by the engineer*."

Again, it may be said the words "in writing" indicate that the engineer is invested with the discretionary power to determine whether the contractors have by freshets become entitled to additional time. It is sufficient, we think, to reply that the contract by its own force may as well give them the right to have the allowance in writing as to have it without writing, the requirement of a writing being simply intended to provide better evidence of the amount of additional time which has been fixed as just and reasonable.

But it may be asked, if the additional time is not to be allowed by the engineer by whom is it to be allowed? To answer this question intelligently we must understand precisely what is meant in the question by the word "allowed;" for it has a double meaning. When the contract says, if the contractors are prevented by freshets "additional time may in writing be allowed . . . them," it may be urged that the word "allowed" indicates not merely that they are to *receive* the allowance, but that *some* power is to make it. This is true. But here again we must understand what is meant when it is said, first, that the contractors are to re-

ceive the allowance; and, secondly, that some power is to make the allowance.

Now, when the contract says "additional time may in writing be allowed . . . them" it is evident that the contractors by the allowance are to receive two things—first, the substantial privilege of additional time, and, secondly, a "writing" evidencing that privilege—and when we next come to consider by what power the allowance is to be made, it is important to know whether we are considering the substantial privilege to the contractors, or the mere "writing" evidencing it.

Accordingly, let us first consider what power under this contract makes the allowance of the substantial privilege of additional time. We use the word "power" advisedly, for (aside from the written evidence of it) it is not necessary that any person or party or arbitrator shall allow it. The contract itself, of its own force, may allow additional time and prescribe its amount, or leave it indefinite, or leave it to some person or to several persons to fix. So far, therefore, as concerns the substantial privilege to the contractors of having additional time allowed them, it is not essential to the allowance that the privilege shall be granted or allowed by the engineer, or Chief of Engineers, or any one else, and therefore when the contract says, "*Such* additional time may in writing be allowed *them as* in the judgment of the (engineer) shall be just and reasonable," there is no reason for implying a power in him, which is not expressed in the contract, and making the clause read: "Such additional time may in writing be allowed them *by the engineer* as in the judgment of the (engineer) shall be just and reasonable."

But, as we have seen, the contract not only provides that in the contingency mentioned the contractors may have allowed to them the substantial privilege of additional time, but it also provides that this time "may *in writing* be allowed." Now, writing involves a positive act, and must be

made by some person, and therefore it may be argued for appellants that the words "may *in writing* be allowed them" indicate that the allowance in writing is to be made *by the engineer*.

This, we submit, is a *non sequitur*. If the contingency has arisen upon which the contract gives the contractors the substantial right to an allowance of additional time and requires it to be in writing, then the United States, as the other real party to the contract, is bound to give them that writing by its properly authorized agent or agents. To infer from the mere fact that the additional time is to be "allowed in writing," not only that the engineer in charge is the sole authorized agent of the Government to determine for it whether it will give the writing, and that he alone can give it, but that he is also to determine for the contractors whether they are entitled to the time or the writing, would, we submit, be pure assumption.

In truth, the Government itself never intended to submit to the engineer in charge anything more than the amount of additional time which would be reasonable in case of prevention by freshets. According to our contention, neither party was bound by his judgment as arbitrator, except as to the one subject-matter referred to him by the contract, namely, the amount of time; and as, on the one hand, his judgment that the contractors were not prevented by freshets could not bind them, so his judgment, *as arbitrator*, that they had been so prevented could not bind the Government. If he essayed to determine whether there had been prevention by freshets he did so, not as arbitrator, but as a nominal party to the contract representing the Government. Of course, the Government, through its properly authorized officer, could determine that for itself. Every party to a contract must determine for himself what his contractual obligations are. But we shall see that the engineer in charge was not authorized to determine this even

for the Government without the express approval of the Chief of Engineers.

As he had no power to make the contract without the sanction of the Chief of Engineers (R., p. 15), and since an extension does necessarily alter one important term of the contract—namely, the time of performance—it follows that he could not, as the Government's agent contracting for it, bind it by an extension. That is beyond his power and vests primarily in the Chief of Engineers, whose approval is required as a condition precedent to the taking effect of each and every act on the part of the engineer in charge, excepting only the few very limited powers expressly confided by the contract to him alone.

By the freshet proviso he is made an arbitrator, and as such empowered to do one and only one thing—namely, to decide how much time will be "*such* additional time . . . as, in (his) judgment, shall be just and reasonable." By another clause of the contract his decision "as to *quantity* and *quality* shall be final." Elsewhere he is given general direction of the work. No other independent powers are given him.

Accordingly, when the first extension was "allowed in writing," by what is called the "supplemental contract," it was, it is true, executed by the engineer in charge, as the nominal "party of the first part," and delivered by him to the contractors, but it was made expressly "subject to the approval of the Chief of Engineers," and it was in fact "duly approved by the Secretary of War, the superior of the Chief of Engineers" (Rec., p. 32). Again, when the second and last extension was allowed, the engineer in charge first referred the matter to the Chief of Engineers, with his recommendation that "the interests of the Government will be best served by an extension," and only after "the extension . . . was *granted and approved* by the Chief of Engineers" the engineer in charge, "in writing," notified the other parties that the time for completion was extended.

Again, whilst the contract makes the engineer in charge the active instrument of the Chief of Engineers in *annulling* the contract for failure to begin the work at the agreed time or to prosecute it diligently, it vests the real power of annulment not in him, but in the Chief of Engineers. Although the engineer in charge is, in the first instance, to judge whether the contractors have failed in diligent prosecution of the work, and although he is to give "in writing" the notice of annulment to the contractors, the annulment itself (the taking away of the substantial contract privilege of the contractors to further time for completion of their work) is not confided to the engineer in charge, but derives its whole vitality from "the *sanction* of the Chief of Engineers." In the contingency that the contractors fail in diligent prosecution "in the judgment of the engineer in charge . . . (he) shall have power, *with the sanction of the Chief of Engineers*, to annul this contract by giving notice *in writing*," &c.

To summarize: The practical interpretation of a contract by one of the parties to it, in executing it before any controversy has arisen, is of material assistance in arriving at an understanding of the intent of the parties and of the true meaning of the contract. Further, such a practical interpretation by one party is in the nature of an estoppel to an attempt by such party to subsequently construe the contract, for his benefit, to mean something different from his previous practical interpretation. Now, in this case, as we have seen, on the occasion of each extension or allowance of additional time, the allowance was not by the engineer in charge, but by the Chief of Engineers, or at least by those two officers in conjunction, acting as the proper agents of the United States for the purpose. This procedure by the agents of the appellants would seem to dispose of the contention of counsel for appellants that the question of allowance of additional time was within the sole discretion of

the engineer in charge. We admit that the *amount* of time to be allowed was to be fixed by the engineer in charge, exercising a sound and reasonable discretion—that is to say, if the engineer in charge fixed an amount of additional time not manifestly unjust and unreasonable and amounting to and operating as a constructive fraud on the contractors, his judgment on that point would be final. But as to the broader question of whether or not an extension was to be granted, involving a determination of the question of whether or not the freshets had occurred and had prevented the contractors without their fault (*this determination, be it observed, not being binding on the contractors, but being only such a determination as any party to a contract must make when he considers what he must do in order to perform his contractual obligations*), our contention is that this question was not one resting in the sole discretion of the engineer in the capacity of an arbitrator or referee appointed by the contract, but required for its determination the action of the same power which made the contract—that is to say, the action of the *United States* through its agents (whoever they might be), who were the proper agents for the purpose. And the contract has, before this controversy arose, been construed by the agents of the appellants in just this way, for the several writings evidencing allowances of additional time that were made in behalf of the United States to the contractors were made *not merely by the engineer in charge*, but with the prerequisite authority of the Secretary of War or of the Chief of Engineers, or by those officers and agents of the appellants in conjunction with the engineer in charge. In short, the Government, through its Chief of Engineers (or his superior, the Secretary of War), having determined, *for itself*, that under its contract the contractors were entitled to receive from it "an allowance in writing" of additional time, caused that writing to be executed by the engineer in charge, as its nominal representative "party

of the first part" in the contract, gave that writing validity by the approval of its other agent, who had the real authority to determine, *for it*, whether the writing should be given, and then, through the engineer as the intermediary between it and the contractors, named in the contract, it delivered this writing to the contractors.

It would be no answer to this contention of appellees to say that these extensions were not under the freshet proviso. In the first place, as we have shown, the Government has not entered into a contract under which it has given power to the engineer to bind it in such a material matter as changing the time within which the contract must be performed. Such a change, whether made under the freshet clause or for any other reason, must be made by *the Government* through its agent having power for it to *make* and alter the contract, to wit, the Chief of Engineers. Therefore an extension admittedly under the freshet proviso would require more than the agency of the engineer in charge. In the second place, two extensions of the similar contract for the lower work (containing all of the provisions under discussion here) were applied for *on account of freshets* and were *granted by the Chief of Engineers* (Rec., pp. 40, 41).

There is yet another reason for holding that the freshet proviso did not so far extend the arbitration power of the engineer as to authorize him to decide for the contractors whether freshets and not their own fault prevented the completion of their work at the time agreed upon.

In the first part of the long paragraph containing the freshet proviso there is a provision for the *annulment* of the contract for delay or want of diligence during the original contract period. It reads as follows:

> "If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the

work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the SANCTION of the *Chief of Engineers*, to *annul* this contract by giving notice *in writing* to that effect to the party or parties (or either of them) of the second part," etc.

Finding I, Rec., p. 31.

Now, there are here two grounds of annulment: *First*, delay or failure to *begin* performance; *secondly*, failure "in the judgment of the engineer in charge" to *prosecute* the work diligently.

The first of these grounds of annulment is not left to the arbitrament of the engineer in charge. If the contractors have *in fact* begun the work at the time prescribed in the contract, then the contract cannot be annulled upon the ground that it has not so been begun. Although the engineer may report that it has not been so begun, and even with the approval of the Chief of Engineers attempts to annul the contract, there is no legal annulment. Nor is the second ground of annulment left to the arbitrament of "the engineer in charge," but the real arbitrament is confided to the *Chief of Engineers*, whose "*sanction*" of the annulment is expressly required, notwithstanding the engineer in charge is to perform the sanctioned act and "annul this contract by giving notice in writing to that effect," and notwithstanding the annulment must be preceded by the "judgment of the engineer in charge" that the contractors have failed in diligent prosecution of the work.

Now, two facts are important to be observed in this connection. In the first place, in this opening clause of the paragraph, when the contract *intends* to refer the question of diligence to the engineer's judgment, even provisionally it expressly says so; whereas in the clause in the freshet proviso relating to the contingency of prevention by freshets, it does nothing of the sort. Yet it could as well have done

so there too had it been intended to give him power as arbitrator to decide for both sides whether there was prevention by freshets, etc.

In the second place, it will be noted that in the annulment clause the engineer in charge, who, as representing the United States, is one of the very parties to the contract, who has superintendence and direction of the work, who is responsible for its conduct, who may be subject and sensitive to blame for delays, who may therefore be much too exacting as to speedy performance, and whose legal status is opposed to that of the contractors, is *not* confided with the power to annul the contract for want of diligence and cannot bind the contractors by his judgment that they have failed in diligence, but merely has the right given him to report his judgment to the Chief of Engineers, whose sanction is absolutely required to give that judgment any vital force, and then the engineer in charge is given the mere formal power to give the annulling notice.

According to the contention for the appellants, if during the original contract period the contractors were in fact diligent, and were in fact prevented by freshets from completing the work, and could prove these facts to the satisfaction of the Chief of Engineers or any court, yet if the engineer in charge thinks otherwise, although he could not *annul* the contract (because the contract has not given him jurisdiction to act on his judgment in giving notice of annulment without the previous sanction of the Chief of Engineers), still, upon his erroneous judgment of the identical facts which would not have justified annulment, he can, at the end of the contract period, accomplish the same substantial result by simply refusing "such additional time" as the freshets have not only rendered "just and reasonable," but absolutely essential to the completion of the work. We do not believe this court will resort to implication (as it

must) to give the engineer such a power to bind the other parties with whom he has contracted.

But it might be said that although the Government or the Chief of Engineers in making its contract may not be willing, by the *annulment* clause, to delegate to the engineer in charge the power to *terminate* the contract during the period fixed in it for performance, and thus deprive the contractors of the benefit of the contract, the Government or the Chief of Engineers may be quite willing to delegate to engineers in charge of Government work the power to *extend* the contract. In reply to such a contention it would seem sufficient to say: The addition of time by extension and the subtraction of time by annulment are equally material changes of the same material term of the contract, namely, the time of performance, and so far from the Government being more willing to delegate the power to extend the contract for the benefit of the contractor than to annul it for its own benefit, the presumption is just the other way, for the Government (that is, here the Chief of Engineers) would surely as carefully guard against imprudent extensions by its numerous engineers in charge of Government work to its detriment as against ill-advised terminations of them to the detriment of the other contracting party. The truth is the Chief of Engineers is the real authority in all these matters (subject, of course, to his superior, the Secretary of War), and the various engineers in charge of Government works are merely subordinate intermediaries between him and the contractors, vested in general only with such limited powers as are thought proper to delegate to them to superintend and report upon the work. Counsel for appellants contended that if, in the event of actual prevention by freshets and without fault of their own, the contractors would have the legal right to "additional time . . . such as shall . . . be just and reasonable," then these extensions might be indefinitely repeated to the Government's detriment. The

answer is twofold: First, such repetition of the extension would in each case depend upon prevention by freshets without fault of the contractors, and in that event they *ought* to have just and reasonable extensions; and, secondly, if the contention for appellants (Appellants' Brief, p. 29) be conceded that the engineer in charge is given absolute discretion to make or refuse extensions, it follows that he may, by repeated, though imprudent, extensions, indefinitely bind the Government, to its detriment, and when it ought not to be bound.

Suppose that under the contracts in this case an extension on account of freshets had been granted by the engineer in charge by his individual action, without the approval of the Chief of Engineers, when in fact there were no freshets; that the Chief of Engineers thereupon disregarded such grant of extension and removed the engineer in charge, and proceeded to make new contracts with other contractors for finishing the work, and that the original contractors brought suit against the United States for breach of the extended contract—could it not be argued conclusively by the Government that the engineer in charge had no individual power to make the extension?

Second.

The appellees had the right to the judgment of the engineer as to how much additional time would be just and reasonable and to be allowed that additional time; but he having refused to exercise his judgment or to name any time at all, the further performance of the contract was wrongfully prevented, and the appellees are entitled to damages.

If we are right in our contention that the contract does not make the engineer judge of the question whether the prevention of completion was due to freshets, etc., then it is unnecessary for us to establish either (1) that he rendered no decision, or (2) that his decision was so grossly wrong as

to be constructively fraudulent, or (3) that his decision is reviewable.

But even if it should be held that the engineer was authorized to decide both for the Government and the contractors that they were not so prevented, then we submit, first, that they had a legal right to a *bona fide* decision from him, and, secondly, that if (1) he rendered *no* decision, or (2) rendered only a constructively fraudulent one, his conduct operated as a breach of the contract.

I. The right of the contractors to a *bona fide* decision from the engineer we do not understand to be disputed.

II. In fact the engineer rendered no decision at all. He simply refused to allow any additional time. This is expressly found in finding X (p. 36).

It is therefore needless to inquire whether (as we think we have shown in our former brief), even if his non-action could be taken to have amounted to an adverse decision, it was so grossly contrary to the established facts shown in the findings as to amount to constructive fraud on his part and plain spoliation (Crane Elevator Co. *vs.* Clark, 80 Fed. Rep., 705).

On the former argument we were asked whether this finding by the Court of Claims that the engineer had failed to render any decision might not be a conclusion of law. We think not. Whether the contractors were *entitled* to his decision is a question of law, but we submit that whether he decided—whether he *in fact* decided—is purely a question of fact. The mental state, the words and the acts of an arbitrator, it seems to us, are as purely facts as any conceivable, however intangible they may be. Whether he has rendered a decision may, logically, be the subject of proof—by a writing, if such has been given; by his words, if he used any, to indicate it; by his conduct, which may show it. And that he did

not render such a decision may logically be proven by similar testimony. If in particular cases the law, for reasons of its own, will not admit such proofs, its rejection of the proofs cannot change the essential nature of the question to which the proofs are addressed, and cannot convert it from a question of fact into a question of law, nor change the conclusion upon that question from a conclusion of fact into a conclusion of law.

And if the finding that the engineer did not in fact render a decision is not a conclusion of law, but a conclusion of fact, then the evidence upon which the finding was grounded by the Court of Claims is not material to be inquired into here. What that evidence was this court does not know, and if it were in the record it would not be considered.

Third.

The freshet proviso was never abrogated or exhausted of force by the first extension of the period for completion of the work, as contended by counsel for appellants, but remained a vital part of the contract as extended.

The first proposition of the brief of counsel for appellants is the following:

> "The appellees were only entitled as of right under the contract to an extension of time for the commencement or completion of the work described, in the event that they were prevented from commencing or completing said work by reason of ice, freshets, or the force and violence of the elements, *within the periods mentioned in the original contract;* and if not so prevented during *that* period, there is no such right given to them in the future, unless again contracted for, although the time for completion was thereafter extended as a matter of grace."

They base this contention upon the last clause of the freshet proviso, which is as follows:

> "But such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

They claim that "*such* allowance" (they underscore "such") refers to one and only one allowance, namely, the first allowance at the end of the original contract period, and that that one allowance exhausted the privilege of extension. They say:

> "The last clause of the contract providing that such extensions should not impair the obligations of the contract, but should subsist and take effect as though it was the date originally agreed upon . . . refers only to such extension or change in dates as is mentioned in the preceding sentences, to wit, such additional time as the engineer might grant them because of their having been prevented from commencing or completing the work during the periods mentioned in the original contract. . . . Not having been so prevented during *such* time, and no *such* extension having been granted, this clause, of course, has no continuing effect. It is at an end. It cannot be revived except by a new contractual stipulation of like import. This was never expressly done."

We fail to perceive force in this contention. To say that all "the rights and obligations of the parties" shall, during the first period of extension, remain precisely as if the new date for completion had been the date originally agreed, is one thing. To say that when the first extension has been made all the rights and obligations of the parties shall remain except that one right and one obligation, namely, the right of the contractors to additional time in the event of prevention by freshets and the obligation of the other party

to recognize it, shall be dropped out of the contract, is quite another thing. Counsel on both sides agree that the freshet proviso, in case of prevention by freshets, does change the *date* of completion, does extend it. The clause in question does expressly also extend "the rights and obligations of the parties under this contract." Amongst the material "rights and obligations of the parties under this contract" is the very material one relating to extension in case of prevention by freshets. It is not expressly excepted from the operation of the clause providing generally that the rights and obligations are to remain in force. To resort to implication and say that this protective-freshet clause is not to continue in force notwithstanding the contract without exception expressly says the rights and obligations of the parties "*shall* subsist," etc., would, we submit, be entirely unwarranted by the language or intent of the proviso and would at once contravene important rules of construction and bring about a manifest injustice, for the result would be that, although the contractor be induced (as the appellees were here) to make large investment on the faith of an extension, yet, although the extension by act of God proves valueless, they are utterly without remedy. Such a result should surely make any court pause. On the other hand, we submit that the effect of the first extension was to change the time and only the time of completion; that it left all the other "rights and obligations of the parties" as if the new date had been the one originally named; that the same was true of any subsequent extension, and that amongst these rights and obligations there were none more important than those secured by the freshet proviso, and none which should be more liberally construed in favor of the contractors.

But it may be said that when an extension was granted under the freshet proviso the extended *date* is to be considered "precisely as if the new date for such commencement or completion had been the date originally agreed

upon," and the right to further extension would therefore depend upon whether the contractors had been prevented by freshets, without fault of their own, at *any time* (whether during the extension or during the original contract period), and such faults, even prior to the extension, would prevent their right to a further extension, and the extension therefore could not operate as a waiver of faults during the original period or any prior extension. This proposition, we think, is fatally defective for two reasons. In the first place, it is based upon a totally erroneous reading of the language of the contract. The contract does not say that the extended *date* is to be considered "precisely as if the new date . . . had been the date originally agreed upon," but that the "*rights and obligations* of the parties under this contract" "shall subsist, take effect, and be enforceable precisely as if the new date . . . had been the date originally agreed upon." In other words, whilst the date is extended, the terms of the instrument remain in full force. (Let it be observed that we are discussing now the meaning of the freshet clause in the original contract prior to any extension.)

Now, we contend that the very first extension of the contract necessarily operated as a waiver of any previous fault of the contractors occurring during the original contract period, and that such waiver did not alter or affect the *terms* of the instrument nor the rights and obligations of the parties under them, but merely concerned the *performance* of those terms. Performance is not a part of the contract, but is the doing by one party of the thing contracted to be done. A contract never determines whether the thing to be done has been done so as to conform to its requirements, but merely prescribes the thing to be done, and thus gives the parties and the courts the basis upon which to judge whether the performance conforms to the contract terms. Nor does an acceptance of work which does not in reality conform to the terms of a contract alter those terms.

A waiver of exact performance does not alter or abandon the contract. It does not destroy its terms.

We submit that when the first extension was made it necessarily involved an acceptance of the work up to that time—in other words, waived any default of the contractors during the original term of the contract. To hold otherwise would be to invalidate every one of the extensions under both contracts and to put it into the power of one party to a contract to induce large outlays of time, money, and labor by the other, with the sole effect of spoliation; and all this by a refinement of reasoning which does not belong to this age.

In the next place, the proposition is fatally defective because the last extensions in both cases were made with very material alterations of the terms of the contracts. In the case of the "upper work," instead of a minimum of 150 men, 300 were required; a new incline, 90 cars, 10 steam drills, and force and plant sufficient to remove 640 cubic yards per day. The Chief of Engineers granted and approved the extension on these terms. The extension modifying the contract in these material particulars constituted a new contract, wherein every provision of the original contract consistent with the modifications and including the entire freshet proviso remained in full force. Thus the contract itself, for the period of the last extension (1888), *expressly provided* that in case the appellees were prevented *that year*, by freshets and not their own fault, from completing the work, they should have the benefit of the freshet proviso.

Fourth.

The Damages Awarded by the Court of Claims were Properly Awarded.

Counsel for appellants contend that the facts found by the Court of Claims are not sufficient to support its judgment, because the profits, the loss of which that court finds resulted from the appellants' breach of the contract, were uncertain and remote. In support of this argument they say there is no determination of the amount of time that would have been just and reasonable, nor that the plaintiffs could and would have completed the work within such just and reasonable time, nor that "in the future the same industrial and climatic conditions and the same relations of supply and demand would obtain as in the past," nor that the appellees sought and failed to obtain other employment for themselves, their plant, and their capital after the breach of the contract. They then argue in much detail the impossibility of ascertaining with absolute precision how much time would have been "just and reasonable," or exactly how long it would have taken the contractors to finish the work, or exactly what the industrial and climatic conditions might have been during this extended time, or how much the market price of the broken rock might have varied from day to day, and so on. We believe that both upon principle and under the decisions of this court, which we will presently refer to, this objection to the judgment is entirely fallacious. In the first place, the objection that the lower court has not found as a fact "the amount of time that would have been a just and reasonable extension" is based upon the assumption that when the engineer failed to allow such "just and reasonable" time, it became the duty of the Court of Claims to do so, whereas, in truth, since the appellees are not suing for additional time within which to complete the work, there

is no need for a finding as to how much time would be just and reasonable. It may be true that the Court of Claims, in estimating the profits as a jury would do, would consider how much time would be required to complete the work, just as it would consider a vast number of other details of evidence in estimating the loss of the appellees; but in the language of this court in the case of United States *vs.* Smith (4 Otto, 914):

> "We know of no rule of law or practice which requires a court or jury to itemize the elements of the calculation by which it arrived at its final result. In this case the court was not asked to say whether it included this or that supposed element of compensation in its judgment."

As to the objection that the Court of Claims does not find that the appellees could and would have completed these works within a reasonable time, we think it is likewise sufficient to reply that since the contractors are not asking for such additional time to complete the work, it is not a subject of inquiry whether they could or could not have completed it within a particular time. We may assume that the moment it became known that they would not be allowed to complete their contract and avail themselves of their large investment made upon the faith of it, their credit was so far impaired that they could not carry on the work at all, and yet the injury done by the breach of the contract is none the less, but all the more certain.

Certainly it is to be presumed that an existing profitable contract would be taken advantage of by the contractors, and that it was a profitable contract is shown beyond dispute by the findings of the court below.

As to the objection that in order to sustain a judgment for profits "it is necessary to have found that in the future the same industrial and climatic conditions and the same relations of supply and demand would obtain as in the

past," such a proposition would prevent the recovery of profits in every case based upon the breach of an uncompleted contract.

The fact is established (Finding XV, p. 37) that for this rock, at the place where it was situated—the city of Louisville—there was a "ready market for it at a specific price, $1.25 per yard." The market price at the nearest market controls in estimating the value of a commodity to ascertain profits (Grand Tower Co. *vs.* Phillips, 23 Wall., 479, 480).

As to the objection that the findings do not show that the appellees sought for and obtained other employment for themselves, their plant, and their capital, it seems sufficient to answer that this is not a case where the plaintiffs sue for the value of rejected services contracted for, but sue for the net value of rock which by the contract was to become their property and which has been taken away from them.

If a farmer, with a three-horse wagon, engages a blacksmith to overhaul his wagon and put it in complete order, and agrees in payment to give him the lead horse, and then after the work is nearly done drives off with his wagon and full team, when the blacksmith sues to recover the value of the horse, less the reasonable cost of completing his work upon the wagon, according to the contention of counsel the farmer may escape payment by saying it is impossible to tell exactly how long it would take the blacksmith to complete his work or what is the value of the iron or wood or canvas required to complete it, for the markets for all of these materials may vary greatly from day to day. He might also maintain that the climatic conditions may materially delay the blacksmith in obtaining the materials and labor necessary to complete the work; that the value of the horse is a thing about which men may differ, and, lastly, that the blacksmith must show that he could not find other jobs which would remunerate him partially, perhaps completely, and possibly more fully than the one which has been taken away from him. We submit that the cases are parallel, and we submit

further that it is the every-day practice of *nisi prius* courts to award damages notwithstanding such critical objections.

Counsel for appellants say:

> "The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

This is the language used by Mr. Justice Lamar in the case of Howard *vs.* Stillwell, 11 Supreme Court Reporter, 503 (139 U. S., 169), and, as far as it goes, is to us an entirely satisfactory statement of the law. But it will be noted that it is followed in the opinion by this pertinent qualification:

> "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself or the special circumstances under which it was made it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

The court then proceeds to comment upon and approve the leading case of Hadley *vs.* Baxendale, 9 Exch., 341, which it says "has been cited with approval and commented on by many of the courts of this country and by text-writers

as well. The general principles of it, we believe, are recognized and enforced in most, if not all, of the several States." In that case the plaintiffs were owners of a flour mill and sued a machinist for loss of profits due to delay in supplying machinery, and it was held:

> "The proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i. e.*, according to the usual course of things from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. . . . It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."

In another flour-mill machinery case (Pennypacker *vs.* Jones, 106 Pa. St., 237, 242) Mr. Justice Green used this language:

> "It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of

> doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract, and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill-owner it is no part of his engagement that a profitable business shall be carried on with the machinery furnished."

In the three cases cited damages were refused, but the rule laid down in all of them is applicable to the case at bar, and we think makes certain the right of the appellees to the damages adjudged. In this case, not only are the profits not remote, but their loss is "as a matter of course, the direct and immediate result of the non-fulfillment of the contract," and they are "a part of the contract itself and can be implied from its nature and terms." If this be true, it brings the profits in the present case within the very language of Mr. Justice Lamar, quoted by counsel for appellants.

Again (still quoting his language in Howard *vs.* Stillwell), in this case it is plainly true that "the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are . . . within the intent and mutual understanding of both parties at the time it was entered into." Indeed, they form the express consideration of the contract, and therefore must be held to have been within the intention of the parties. The rock was to be the property of the contractors. It was a fact, and it was presumably a known fact, that the cost of excavating and removing the rock was greater than the 85 cents per yard to be paid to them, and the whole beneficial consideration—the whole profit—causing the appellees to enter into the contract was the value of the rock over and above the cost of

production. We cannot conceive a case in which profits are more distinctly "a part and parcel of the contract itself" or "within the intent and mutual understanding of both parties at the time it was entered into."

In the mill machinery cases, as Judge Green said:

> "It was no part of the contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect."

When they agreed to erect the machinery they did not know whether the plaintiffs were doing a profitable business or not; they did not know whether they would continue in business or not; there was no engagement on the part of the plaintiffs to do either of these things. But in the case at bar the appellees, in substance, contracted for a profit—that is, they contracted for this rock, and therefore *contracted for its value;* and if, as the events proved, its value exceeded the total cost of handling it they may be fairly said to have directly contracted for that profit.

The case of Anvil Mining Co. *vs.* Humble (153 U. S., 540) is strikingly like the one at bar. In that case the contractors agreed with the mining company to mine certain levels of iron ore in the company's mine, and were to receive 60 cents per ton. It was provided that the company should have the right to terminate the contract at any time it should decide that the system of mining was "prejudicial to the future welfare and development of the mine." The company wrongfully stopped the work, and the plaintiffs sued for the profits which they would have made had they been allowed to complete the work according to their contract. After stating the fact (and it was a fact and not a conclusion of law we think that the court meant) that the company never "made such determination," Mr. Justice Brewer, in delivering the opinion of the court, continues:

> "A third proposition of defendant is that 'under the facts in this case the damages claimed for loss of profits

were too uncertain, contingent, and conjectural to found a verdict upon. Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which are reasonably certain may be. As said by Mr. Justice Lamar, in Howard *vs.* Manufacturing Co., 139 U. S., 199, 206; 11 Sup. Ct., 500: 'But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.' See, also, Cincinnati Siemens-Lungren Gas Illuminating Co. *vs.* Western Siemens-Lungren Co., 152 U. S., 200; 14 Sup. Ct., 523.

"Now, there was in this case testimony to show the cost of mining each ton of ore, and also the amount of ore remaining in the first level of the mine at the time the work stopped. From these figures the profit which would have been made by the plaintiffs if they had completed the work of mining all the ore on the first level is a mere matter of multiplication. It is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out; but still proof of the cost of taking out that which had been mined, and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore. Equally true is it that there was not mathematical certainty as to the amount of ore remaining in the mine; yet both plaintiffs and defendant furnished testimony as to such amount, and testimony which, while not such as to put it beyond doubt, was sufficient to enable the jury to make a fair and reasonable finding in respect thereto. The case is one, therefore, in which the profits are not open to the objection of uncertainty, and certainly not to that of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent

and mutual understanding of both parties at the time it was entered into."

We submit that this authority settles the law of this case. In that case the amount of ore to be excavated was uncertain. In this case the amount of rock was ascertained to a mathematical certainty. In that case the cost of mining each ton of ore was not certain in the sense contended by counsel for appellants to be necessary. The same is true here. Yet this court held that testimony showing such cost and amount was sufficient. Such testimony must have been before the Court of Claims in this case, for we have their positive findings. It was true there also that the cost of mining one ton of ore might differ from the cost of mining another, but the cost of taking out what had been mined and the known condition of the works furnished a basis for a reasonable estimate which the court considered sufficient to go to the jury, and so says the court, "The profits are not open to the objection of uncertainty." The same is true in this case. Again, in that case the very consideration of the contract was that the plaintiffs should have the natural profit to be yielded by the payment of thirty cents per ton, while in the present case the consideration of the contract was that the plaintiffs should have the value of the rock to be excavated; and as in that case it was held, so we submit that in this case it must be held, that "the profits are not open to the objection of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent and mutual understanding of both parties at the time it was entered into."

As to the questions of reasonable certainty of the contractors finishing the work if they had had just and reasonable additional time, of industrial conditions, of climatic conditions, of supply and demand, of an established market price, and, in brief, of the reasonable certainty of the con-

tractors making the profits claimed if they had been permitted to complete the work, we further submit that the positive findings of the Court of Claims conclude all of these questions and make it unnecessary and contrary to precedent that they be again inquired into in this honorable court. Indeed, it is impossible to make such inquiry in the absence of all the evidence which the Court of Claims had before it (United States *vs.* Smith, 4 Otto, 914; United States *vs.* New York Indians, 173 U. S., 464, 470).

Suppose that the Court of Claims had before it evidence that the contractors actually sold large quantities of the rock excavated, which was their property under this contract, and also had evidence as to what was the market price? They must, on such evidence, obviously have considered the profits as immediate and not remote, and their positive findings as to what would have been the contractors' profits, except for the breach by the other party to the contract, necessarily followed. But the court below was not required to include such evidence in their findings (United States *vs.* New York Indians, 173 U. S., especially page 470; Rule I of Supreme Court relating to appeals from Court of Claims). That an appeal from the Court of Claims does not bring up the whole record is a statutory regulation (R. S., § 708, and pursuant regulations by the Supreme Court, 3 Wall., vii; 17 Wall., xvii), and when this regulation provides for a finding of the facts and a certification of such finding, without the evidence, to the Supreme Court, it is a legal and statutory presumption that such finding is based on reasonably sufficient evidence and is conclusive as to the evidence and facts in this court. The findings of the Court of Claims are like the verdict of a jury and will not be disturbed. Its findings are more conclusive than a verdict in this respect, that while a verdict may be accompanied to the court of error by a transcript of the material part of the evidence, the findings of the Court of Claims are unaccompanied by and are conclusive as to the evidence.

In conclusion, we suggest to your Honors' consideration this general statement: That the most manifest and important protection which the contractors would naturally seek, and the Government in fairness would grant, in a contract for rock excavation in the bottom of the Ohio river ("at the falls of the Ohio") would be a clause giving them the substantial right to reasonable further time to complete their work and recoup their loss in preparation for it, if in truth they should, without fault of their own and by the act of God, be prevented from completing it; that this protection was just as essential during any extended period of time given them for completion, and upon the faith of which their investment is continued or increased, as for the original contract period; that such a clause, aside from the consideration that it was in a contract prepared and furnished by the other party, should be liberally construed to give the contractors the fullest substantial protection in case of such prevention by act of God without their fault; that the proviso could do no harm to the Government and was vital to the contractors; that the contract does not in language refer the question whether such prevention by act of God took place to the engineer in charge or any one else to decide for the contractors without interpolating the words "by the engineer;" that such an interpolation would utterly destroy the right of the contractors to protection against ruin by act of God and no fault of their own, and, finally, that this court will not by such implication bring about such a result.

We refer to our original brief for the discussion of such points as are not discussed in this, and respectfully submit that both the findings and the conclusions of the Court of Claims should be undisturbed, and that the judgment should stand.

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